BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 13 Original

In the Matter

of the

Petition of the REPUBLIC OF PERU, owner of the Peruvian Steamship "UCAYALI," for a writ of prohibition and/or a writ of mandamus against the Honorable WAYNE G. BORAH, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the other judges and officers of said court.

FURTHER BRIEF ON BEHALF OF THE REPUBLIC OF PERU, SUBMITTED PURSUANT TO THE ORDER OF THIS COURT DATED JANUARY 18, 1943

MONROE & LEMANN,
HAIGHT, GRIFFIN, DEMING & GARDNER,
Proctors for the Republic of Peru.

HERBERT M. STATT,
LINDSAY D. HOLMES,
of Counsel.

CORPORATE PRESS, INC., NEW YORK CITY

BLANK PAGE

INDEX

Cases Cited.

Statute Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. ..... Original

In the Matter
of the
Petition of the REPUBLIC OF PERU, owner of the Peruvian Steamship "UCAYALI," for a writ of prohibition and/or a writ of mandamus against the Honorable WAYNE G. BORAH, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans, Division, and the other judges and officers of said court.

FURTHER BRIEF ON BEHALF OF THE REPUBLIC OF PERU, SUBMITTED PURSUANT TO THE ORDER OF THIS COURT DATED JANUARY 18, 1943

Statement.

By direction of the Court in the order entered January 18, 1943, on the rule "requiring the respondent to show cause why leave to file the petition for writ of prohibition and/or mandamus should not be granted * * *"

> "Counsel are requested to discuss in their briefs and on the oral argument the question of the jurisdiction of this Court to entertain the petition and to grant the relief sought, and to discuss the effect of the failure to present the application to the Circuit Court of Appeals."

In compliance with that direction the following additional brief is respectfully submitted in support of original and exclusive jurisdiction.

POINT I.

By statute and precedent this Court has always had original jurisdiction to issue writs of prohibition and/or mandamus to the District Courts

Statutory authority of this Court to issue original writs of prohibition and/or mandamus under the circumstances presented by this petition is clearly conferred by the Judicial Code, Section 234 (U. S. Code, Title 28, Section 342), which reads:

> "§342. *(Judicial Code, Section 234.) Prohibition and mandamus.* The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice-consul is a party. (R. S. §688; Mar. 3, 1911, c. 231, §234, 36 Stat. 1156.)"

That the extraordinary and summary relief of direct and original recourse to our highest court is authorized in circumstances in which prohibition and/or mandamus are appropriate is a recognition of probable exigency and of the futility of requiring an intermediate appeal to a Circuit Court of Appeals, limited in its jurisdiction to final determinations by the District Court and hence powerless to review an interlocutory rejection of a plea of sovereign immunity, as in the case at bar. (Please see *infra*, p. 6, *et seq.*)

In 1795, according to what appears to be the earliest officially recorded case on the subject, this Court in *United States* v. *Peters*, 3 U. S. (3 Dallas) 121, on original application issued its writ of prohibition to the District

Court to prevent assumption of jurisdiction in admiralty over a vessel owned by the French Republic and against the protest of that nation. Although the present Section 234 of the Judicial Code (U. S. Code, Title 28, Section 342) was then in force as Act of September 24, 1789, c. 20, §13, no reference was made to it; the need for intermediate appeal was apparently argued (p. 128), but rejected without comment.

In *Ex parte State of New York, No. 1,* 256 U. S. 490, prohibition issued directly out of this Court without prior application to the Circuit Court of Appeals to restrain a suit against certain tugboats, the claimants of which sought to implead the State Superintendent of Public Works as charterer thereof. In that case, this Court said:

> "The power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction is specifically conferred upon this court by §234, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156). And the fact that the objection to the jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset, where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction. *In re Cooper,* 143 U. S. 472, 495" (pp. 496-497).

The case also holds that it is immaterial whether the suit is *in rem* or *in personam* (p. 498); the essential nature of the cause, in effect against a sovereign, entirely governed its disposition (p. 500).

Ex parte State of New York No. 2, 256 U. S. 503, reaches the same result.

The Western Maid, 257 U. S. 419, likewise came into this Court on direct application for a writ of prohibition and/or mandamus without preliminary reference to the Circuit Court of Appeals. The case decides that prohibi-

tion will issue out of this Court to prevent suits against the United States arising out of collisions. As in the case at bar, the vessels were owned, absolutely or *pro hac vice,* by a sovereign state, the United States, and were engaged in a public service, namely, the carriage of food to the war-stricken peoples of Europe in 1919.

In *Ex parte Indiana Transportation Co., Petitioner,* 244 U. S. 456, this Court likewise granted an original petition for a writ of prohibition to the District Court. In that case, a libel had been filed against the vessel owner but subsequently leave was granted to amend the libel to add 373 other libelants. The petitioner had excepted below on the ground that it could not in law be called upon to answer an amended libel as to the additional libelants and on the further ground that the Court had not jurisdiction over it with respect to such additional libelants, but these exceptions were overruled. This Court granted a writ of prohibition because the District Court attempted to exceed its jurisdiction.

In re Cooper, 143 U. S. 472, is often cited for its enunciation of the legal principles upon which rests the original jurisdiction of this Court to issue writs of prohibition to the district courts in admiralty causes. In that case, the Court said (pp. 494-495):

> "Section 688, Revised Statutes (now Judicial Code, §234), provides: 'The Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction.' And although we were of opinion when the application for the rule was made, and subsequently held (*McAllister* v. *United States,* 141 U. S. 174), that the District Court for Alaska was not one of the courts mentioned in Article III of the Constitution, declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall from time to time establish, we

nevertheless concluded that where the District Court of Alaska was acting as a District Court of the United States and, as such, proceeding in admiralty, it came within that section, and this court had power to issue the writ of prohibition to that court in a proper case; and as the questions involved could be, in our judgment, more satisfactorily presented upon a return, we granted the rule. *In re Cooper, Petitioner,* 138 U. S. 404.

The writ thus provided for by section 688 is the common law writ, which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of matters not arising within, its jurisdiction. Its office is to prevent an unlawful assumption of jurisdiction, and not to correct mere errors and irregularities. *Ex parte Gordon,* 104 U. S. 515; *Ex parte Ferry Company,* 104 U. S. 519."

In the *Cooper* case, the writ was denied because the Court found that the District Court clearly had jurisdiction of the cause and that the petitioner's proper remedy was by appeal from the final decree which had theretofore been entered in the District Court. The case now before the Court has not proceeded to trial and, of course, no final or interlocutory decree can be entered. (Please see Point II, *infra,* p. 6:)

In *Ex parte Phenix Insurance Co.,* 118 U. S. 610, the District Court of the United States for the Eastern District of Wisconsin, sitting in admiralty, asserted jurisdiction over a vessel owner in a case in which damages resulted from a fire in a planing-mill which the petitioner's vessel had passed. This Court granted prohibition against the District Court as a matter of original jurisdiction, on the ground that the cause was not cognizable in admiralty.

For additional authorities sustaining the power of this Court under the statute, see also:

Ex parte Christy, 44 U. S. 292;

Ex parte Gordon, 104 U. S. 515;
In re Cooper, 138 U. S. 404;
Smith v. *Whitney,* 116 U. S. 167;
In re Baiz, 135 U. S. 403;
In re Fassett, 142 U. S. 479;
In re Rice, 155 U. S. 396.

POINT II.

No intermediate appeal lies to the Circuit Court of Appeals from an order of the District Court rejecting the plea of sovereign immunity.

An order of the District Court rejecting a plea of sovereign immunity does not determine any rights or liabilities of the parties with such finality as to come within the statutory provisions regarding appeals to the Circuit Court of Appeals (Judicial Code §128; 28 U. S. C. A. 225).

On appeal from a final decree on the merits of the controversy after trial, the Circuit Court of Appeals would, of course, have the right to review the question of assumption of jurisdiction, but no statutory or other authority vests it with power to entertain and grant an original application for prohibition and/or mandamus to prevent assumption of jurisdiction in admiralty causes.

The Circuit Court of Appeals for the Second Circuit so held in *Muir* v. *Chatfield,* 255 Fed. 24, writing in part:

> "We will not inquire whether the order of Judge CHATFIELD was right or wrong, because we are without power to grant the prayer of the petition (for a writ of prohibition and a writ of mandamus) in an original proceeding" (p. 25).
>
> • • • • • • • • • •
>
> "This section (§234 of the Judicial Code, 28 U. S. C. 342) confers original jurisdiction in the two specific instances mentioned; i. e., the Supreme Court

> may issue writs of prohibition to the District Courts when they are proceeding as courts of admiralty and writs of mandamus to any federal court when a state or an ambassador or other public minister or a consul or vice consul is a party. This power is without reference to appellate jurisdiction" (p. 26).
>
> * * * * * * * * *
>
> "* * * We regard ourselves as without power to grant the prayer of the petition because there has been no appeal from Judge CHATFIELD's order, and because that order, whether right or wrong, does not interfere in any way with the jurisdiction of this court. He has refused to discharge the vessel, except upon the owner's giving a bond, so that the jurisdiction of the District Court is maintained, and the appellate jurisdiction of this court is in no manner interfered with" (p. 27).

On later direct application to this Court under the title *Ex parte Muir,* 254 U. S. 522, the propriety of the decision in *Muir* v. *Chatfield, supra,* was not questioned; and although the writ was refused because the applicant had not presented its claim of immunity in approved form, the jurisdiction and power of this Court was recognized in these words:

> "The power of this court, under §234 of the Judicial Code, to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty, to prevent an unlawful assumption or exercise of jurisdiction, is not debatable" (p. 534).

In *Ex parte, Muir, supra; Ex parte Hussein Lufti Bey,* 256 U. S. 616; and *Ex parte Transportes Maritimos (Sao Vicente),* 264 U. S. 105, the plea of sovereign immunity was the basis for an original application to this Court for a writ of prohibition. In none of those cases was there an intermediate appeal or any suggestion of its necessity; in each of those cases the jurisdiction of this Court to enter-

tain and consider the application was not questioned. In each of those cases the ground for the rejection was a fatal defect in the formal presentation of the plea. In the first case the public character of the vessel was in doubt; in the second and third the State Department refused its offices.

In the case at bar every detail of the prescribed formula for the presentation of a plea of sovereign immunity has been meticulously fulfilled and has not even been questioned in the proceedings heretofore had. No doubt is left of the character of the vessel, and the *bona fides* of the claim of sovereign immunity and the desirability of its recognition is attested to by every necessary diplomatic and executive officer of the United States. (See p. 6 of the Brief for the Republic of Peru, submitted in support of the petition and discussion and cases cited under Point III, p. 8 *et seq.* in that brief.)

CONCLUSION.

This Court has jurisdiction to entertain the petition and to grant the relief sought and no intermediate appeal to the Circuit Court of Appeals is necessary or possible. To require a final determination below and a preliminary appeal to the Circuit Court of Appeals would defeat the purpose of the statute.

In *Ex parte Gordon,* 104 U. S. 515, this Court said of the writ of prohibition provided for by Judicial Code §234:

> "* * * Its office is to prevent an unlawful assumption of jurisdiction" (p. 516).

and emphasized in *Ex parte State of New York No. 1,* 256 U. S. 490, at page 503, the impracticability of permitting proceedings so challenged "to run their slow course to final decree."

The advantage of and necessity for expedition in the determination of a claim of sovereign immunity and of prompt elimination of threatened assault upon that status, always so vigilantly apprehensive, needs no argument. Neither is it necessary to labor the plain fact that in practical result early recognition of and acquiescence in a valid claim of immunity has material advantages to the courts, to the Executive Departments and to litigants.

Under present conditions, and in particular with regard to shipping practises in this emergency period, the question here presented is of national and international importance.

The Republic of Peru, as petitioner herein, respectfully submits that this Court has jurisdiction in this matter and prays for favorable consideration of its petition.

Dated, February 5, 1943.

Respectfully submitted,

MONROE & LEMANN,
HAIGHT, GRIFFIN, DEMING & GARDNER,
By EDGAR R. KRAETZER,
Proctors for the Republic of Peru.

HERBERT M. STATT,
LINDSAY D. HOLMES,
of Counsel.